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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 JOHN JOSEPH FIELD,

12 Petitioner,

CASE NO. 11cv2147 WQH (BGS)

13 vs.

ORDER

14 MATTHEW CATE, Secretary, CDCR;
ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA,

15 Respondents.

16 HAYES, Judge:

17 The matter before the Court is the Report and Recommendation (ECF No. 9) of the
18 Honorable Magistrate Judge Bernard G. Skomal, filed on March 30, 2012.

19 **I. Background**

20 On September 15, 2011, Petitioner filed his Petition for Writ of Habeas Corpus
21 challenging (1) the 2009 decision of the Board of Parole Hearings finding Petitioner unsuitable
22 for parole and (2) challenging “Marsy’s law” permitting the Board of Parole Hearing’ to defer
23 reconsideration of Petitioner’s suitability for parol as violating the ex post facto clause. (ECF
24 No. 1).

25 On January 12, 2012, Respondent filed an Answer contending that (1) Petitioner’s
26 challenges to the sufficiency of the evidence supporting the Board of Parole Hearings’ decision
27 are foreclosed by the United States Supreme Court’s decision in *Swarthout v. Cooke*, ___ U.S.
28 ___, 131 S.Ct. 859 (Jan. 24, 2011) and (2) the Court of Appeals for the Ninth Circuit concluded

1 that Marsy's law is not an ex post facto law in *Gilman v. Schwarzenegger*, 638 F.3d 1101 (9th
2 Cir. 2011). (ECF No. 4). On March 12, 2012, Petitioner filed a Traverse. (ECF No. 8).

3 On March 20, 2012, the Magistrate Judge issued a Report and Recommendation (ECF
4 No. 9) recommending that the Petition be denied. The Magistrate Judge stated: "To the extent
5 [Petitioner] claims that the decision to deny parole was not based on 'some evidence' or
6 otherwise failed to satisfy substantive due process, the claim is foreclosed as a matter of law
7 because there is no clearly established federal constitutional substantive due process right in
8 parole." (ECF No. 9 at 4) (citing *Swarthout*, 131 S.Ct. at 862). The Magistrate Judge stated:
9 "[T]he only right at issue in the parole context is procedural, and the only proper inquiry is
10 whether the inmate received process in accordance with [*Greenholtz v. Inmates of Neb. Penal*
11 *& Corr. Complex*, 442 U.S. 1 (1979)]." *Id.* The Magistrate Judge concluded: "[B]ecause
12 [Petitioner] has not demonstrated—and the record does not show—that his rights under
13 *Greenholtz* were denied, [Petitioner's] parole claims are not cognizable in this habeas
14 proceeding." *Id.* at 5. The Magistrate Judge stated: "[I]n [*Gilman*, 638 F.3d 1101, the Court
15 of Appeals for th Ninth Circuit] concluded that 'Marsy's Law' is not a prohibited ex post facto
16 law ... because the new law provides a mechanism for inmates to request an advance hearing,
17 there was no significant risk that inmate's incarceration would be prolonged." *Id.* at 6. The
18 Magistrate Judge concluded: "[T]he state courts's rejection of his ex post facto challenge was
19 neither contrary to, nor an unreasonable application of, clearly established federal law as
20 determined by the Supreme Court." *Id.*

21 The Magistrate Judge concluded:

22 IT IS ORDERED that no later than seventeen days after
23 receiving a copy this Report & Recommendation, any party to this
24 action may file written objections with the Court and serve a copy on
all parties. The document should be captioned "Objections to Report
and Recommendation."

25 IT IS FURTHER ORDERED that any reply to the objections
26 shall be filed with the Court and served on all parties within 10 days of
being served with the objections.

27 *Id.* at 7.

28 To date, neither party has filed objections to the Report and Recommendation.

1 **II. Discussion**

2 The duties of the district court in connection with a Report and Recommendation of a
 3 Magistrate Judge are set forth in Federal Rule of Civil Procedure 72(b) and 28 U.S.C. §
 4 636(b)(1). When a party objects to a Report and Recommendation, “[a] judge of the [district]
 5 court shall make a de novo determination of those portions of the [Report and
 6 Recommendation] to which objection is made.” 28 U.S.C. § 636(b)(1). When no objections
 7 are filed, the district court need not review the Report and Recommendation de novo. *See*
 8 *Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005); *U.S. v. Reyna-Tapia*, 328 F.3d
 9 1114, 1121-22 (9th Cir. 2003) (en banc). A district court may “accept, reject, or modify, in
 10 whole or in part, the findings or recommendations made by the magistrate judge.” Fed. R. Civ.
 11 P. 72(b); *see also* 28 U.S.C. § 636(b)(1).

12 Neither party objected to the Magistrate Judge’s Report and Recommendation in this
 13 case. This Court has reviewed the record and the Report and Recommendation in their
 14 entirety. The Court finds that the Magistrate Judge correctly recommended that the Petition
 15 be denied pursuant to *Swarthout v. Cooke*, __ U.S. __, 131 S.Ct. 859 (Jan. 24, 2011) and
 16 *Gilman v. Schwarzenegger*, 638 F.3d 1101 (9th Cir. 2011).

17 **III. Certificate of Appealability**


18 A certificate of appealability must be obtained by a petitioner in order to pursue an
 19 appeal from a final order in a Section 2254 habeas corpus proceeding. *See* 28 U.S.C. §
 20 2253(c)(1)(A); Fed. R. App. P. 22(b). Pursuant to Rule 11 of the Federal Rules Governing
 21 Section 2254 Cases, “[t]he district court must issue or deny a certificate of appealability when
 22 it enters a final order adverse to the applicant.”

23 A certificate of appealability may issue “only if the applicant has made a substantial
 24 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). It must appear that
 25 reasonable jurists could find the district court’s assessment of the petitioner’s constitutional
 26 claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). The Court
 27 concludes that jurists of reason could not find it debatable whether this Court was correct in
 28 denying the Petition. The Court denies a certificate of appealability.

1 **IV. Conclusion**

2 IT IS HEREBY ORDERED that the Report and Recommendation (ECF No. 9) is
3 adopted in its entirety. The Petition for Writ of Habeas Corpus is DENIED. The certificate
4 of appealability is DENIED.

5 DATED: May 24, 2012

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7 **WILLIAM Q. HAYES**
8 United States District Judge
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